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IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1970

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GLORIA JEAN NEPSTEAD
and JOHN EDWARD ASH,

Petitioners,

--vs--

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioners, Gloria Jean Nepstead and John Edward Ash, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 1, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 1, 1970. A timely petition for rehearing en banc was denied on May 11, 1970, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is involved under 28 U. S. C. § 1254(1) and Rule 22(2).

QUESTIONS PRESENTED

1. Did execution of a search warrant on the sixty day from its issuance meet the "forthwith" requirement of Rule 41(c), Federal Rules of Criminal Procedure, where the delay was unexplained but was concluded to be because police were waiting for some activity on the premises to be searched?

2. If the execution was not valid because of the unjustified delay, should the evidence seized pursuant to the warrant be excluded?

STATUTORY PROVISIONS INVOLVED

18 U. S. C. A.

Federal Rules of Criminal Procedure:

Rule 41(c). (The search warrant) shall command the officer to search forthwith the person or place named for the property specified.

Rule 41 (d). The warrant may be executed and returned only within ten days after its date.

STATEMENT OF THE CASE

On August 16, 1968, at approximately 5:30 p.m. to 6:00 p.m. James R. Barron, an agent of the Bureau of Narcotics and Dangerous Drugs of the Department of Justice, obtained a search warrant for premises located at 89 Brighton Street, San Francisco, California. The warrant was only good for daytime service so that because of the lateness of the hour he could not execute it on August 16.

The search warrant states that there was concealed property consisting of "Chemicals including, but not limited to, et cetera, which are used and are now being used as the means and instrumentalities to manufacture D-lysergic acid et cetera."

The narcotics agent placed the premises under surveillance for five days after obtaining the warrant, waiting to observe some activity on the premises. During the afternoon of August 21, the agent was notified by a local law enforcement officer that an informant had been in the premises earlier that day and reported that LSD was to be manufactured that night. During the evening of August 21, the agent observed people on the premises. Agent Barron testified that the manufacturing of LSD is a two-step process that takes approximately 32 to 34 hours to complete.

The next morning, August 22, six days after the issuance of the search warrant, it was executed by federal agents. The search resulted in the discovery of LSD. Incident to said search, three persons were arrested. Thereafter, one of those arrested, Gloria Jean Nepstead, was indicted together with John Edward Ash for

violation of Title 21 U.S.C., Section 331 (q) (l) (Unlawful manufacture of LSD) and U.S.C. Section 371 (Unlawful conspiracy to manufacture LSD).

The District Court for the Northern District of California, following the concurring opinion of Judge Bazelon in Mitchell v. United States, 258 F. 2d 435 (D. C. Cir. 1958), granted petitioners' motion to suppress the evidence because it was not executed "forthwith" as required by Rule 41(c), Federal Rules of Criminal Procedure, notwithstanding the fact that the search warrant had been returned within ten days as required under section (d) of that rule.

In the United States Court of Appeals, the order granting the motion to suppress was vacated. The Court adopted the theory that "forthwith" means any time within ten days after the warrant is issued, provided that the probable cause recited in the affidavit continues until the time of execution, giving consideration to the intervening knowledge of the officers and the passage of time.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN CONFLICT OF PRINCIPLE WITH THE DEICSION(S) OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF FEDERAL RULE OF CRIMINAL PROCEDURE, THE TERM "FORTHWITH" IN RULE 41(c).

Rule 41(c) provides that the search warrant "shall command the officer to search forthwith the person or place named for the property specified." Subsection (d) of this rule begins: "The warrant may be executed and returned only within ten days after its date."

The Ninth Circuit notes that: "The meaning to be ascribed to the phrase execute forthwith has been the subject of some controversy among the circuits. See page 4 of Appendix attached hereto.

The Court then cited the reasoning of the Second Circuit in Case No. 32, 527, 2nd Cir. (Decided November 17, 1969), which states that in reading Rule 41(c) and (d), the term "forthwith" means any time within the ten-day period of limitation for execution and return of a warrant, provided that the probable cause recited in the affidavit continues to exist up to the time of execution.

The Eighth Circuit considered the meaning of forthwith in Spinelli v. United States, 382 F. 2d 871 (8th Cir., 1967) Rev'd. on other grounds, 393 U.S. 410 (1969). The Court agreed with the appellant in that case that the ten-day period is the maximum under Rule 41, but that under the facts and circumstances of a particular case, "forthwith" may require a search and seizure in less than the ten-day period. The Court noted that a warrant is executed upon presently existing facts and that it does not "invest the police officers with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous." Spinelli v. United States, 382 F. 2d 871, p. 885. The Court went on to state that the type of delay which would be permissible would be where the delay is caused by "distance, traffic conditions, weather, inability to locate the person or premises to be searched, personal safety, etc." Id.

"It is by no means clear that the 'forthwith' phrase in Rule 41(c) is a determination of an important policy rather than a belated echo of a medieval royal command." United States v. Dunnings, supra.

The Ninth Circuit in the instant case has followed this theory. Since the word "forthwith" has no significant meaning so long as the ten-day period is satisfied, "it is desirable that police be given reasonable latitude to determine when a warrant has been executed" so long as the facts upon which probable cause was originally based have not grown stale. Page 4, Appendix attached hereto.

The Court of Appeals for the District of Columbia has considered the question of the meaning of "forthwith" in three cases. In Seymour v. United States, 177 F. 2d 732, (D. C. Cir. 1949) the Court held that an arrest warrant satisfied the forthwith requirement when executed after six days where officers tried to serve it promptly but were told that defendant was out of town. The Court stated that forthwith is equivalent to "'. . . within a reasonable time; promptly and with reasonable dispatch.' Webster's New International Dictionary (1946)." Seymour v. United States, 177 F. 2d 732.

In Mitchell v. United States, 258 F. 2d 435, (D. C. Cir. 1958), Judge Bazelon wrote a concurring opinion in which he examined the decisions of several state courts which had dealt with the question of the timeliness of execution of search warrants. In finding that a search warrant should be executed at the earliest reasonable opportunity, he stated:

a search warrant. A number of circumstances, such as distance and weather conditions, may cause a court to consider a warrant to have been executed forthwith, despite some delay (Citations omitted), but delay occasioned merely by the officer assumption of authority to select the time of execution does vitiate the warrant. Even the magistrate has no right, onee he has determined that the conditions for the issuance of a warrant are in existance, to keep the suspect under surveillance and postpone execution of the warrant until such time as it may do the suspect the greatest harm (Citation omitted). Delay in either issuance or service, when deliberate and made by the officers for the purpose of selecting their own time and for their own purpose, whether that purpose be to aid the state or the accused, (takes) away from them the power to issue and serve such a warrant (Citations omitted)." Mitchell v. United States, 258 F. 2d 435, at page 438.

In applying the above-stated principles to D. C. Code §33-414, which contains somewhat similar provisions concerning execution to be "forthwith" and within ten days as does Rule 41(c) and (d), Fed. R. Crim. P., Judge Bazelon concluded:

"To read the ten-day provision of subsection (i) as allowing an unexplained ten-day delay of execution of

a search warrant is to read out of the statute completely the flat requirement that service be forthwith and all of the other foregoing indicia that Congress intended the speediest possible execution of search warrants. As I read the statute, ten days is the maximum allowable delay, even if circumstances make service impossible, but, if earlier service can be made, it must be made as soon as possible after the warrant has been issued." Mitchell v. United States, 258 F.2d 435, at page 440, (D. C. Cir. 1958).

The D.C. Circuit again considered the question in House v. United States, 411 F.2d 725, (D. C. Cir. 1969). In that case the lower court had refused to allow testimony as to whether a search warrant was executed "forthwith because the warrant was executed after eight days, within the ten-day period. The court remanded the case in order to determine whether there had been an explanation of the circumstances of the delay and for snowings of prejudice to appellants.

The Seventh Circuit Court of Appeals has agreed with the principle as stated by Judge Bazelon, in Mitchell, supra, that the police may not unduly delay the execution of a search warrant for the purpose of assuring the seizure of the goods sought.

United States Ex Rel. Beal v. Skaff, 418 F.2d 430, 433 (7th Cir., 1969).

These conflicts, between the Second and Ninth Circuits on one hand and the Seventh, Eighth, and District of Columbia on the other, justify the grant of certiorari to review the judgment below.

2. THE QUESTION PRESENTED IS IMPORTANT IN THE ADMINISTRATION OF CRIMINAL JUSTICE CONCERNING SEASONAL EXECUTION OF SEARCH WARRANTS.

The importance of the issue of promptness in execution of search warrants was considered by this Court in Sgro v. United States, 287 U.S. 206, 53 S. Ct. 138. The court states that "(t)he proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual." Id. 287 U.S. 206 at page 210, 53 S. Ct. 138 at page 140.

In striking down New York's permissive eavesdrop statute, this Court noted that one objection to the statute was that "(p)rompt execution is also avoided." Berger v. New York, 388 U.S. 41, at page 59, 87 S. Ct. 1873 at page 1883.

Judge Bazelon of the Ninth Circuit also noted the importance in a case where the issue was not properly before the Court because it had not been raised below. Nevertheless, he wrote an extensive concurring opinion concerning the importance of execution of search warrants forthwith stating: "Nevertheless, because of the importance in the administration of justice, of the question of criminal seasonable execution of search warrants, I deem it necessary to set forth my views upon that question." Mitchell v. United States, 258 F. 2d 435, at page 437. In Mitchell, as in the case at bar, the question revolved around the important issue of weighing the need for giving police

latitude in order to secure the efficient control of drug traffic against the rights of the individual to be free from undue delay where "the whole tenor of the statute bespeaks immediacy." Mitchell, supra, at page 439.

The warrant in the present case was issued six days before it was executed. Although the house was checked daily for signs of activity, the premises were not kept under constant surveillance so that it was possible that the items mentioned in the warrant could have been brought in at any time during those six days. See page 2 of the Appendix attached hereto. Furthermore, by allowing officers discretion in timing execution of search warrants, the possibility is opened that execution of a warrant could be withheld until property not described in it were available. This would then approach the abhorred writs of assistance, the use of which the Fourth Amendment was drafted to stop. See Cave v. Superior Court, 267 C.A.2d. 517, 520-522. This practice of delaying execution is especially obnoxious in the case at bar where the warrant specified that the items to be searched for "are now being used in violation of 18 U.S.C. . . ."

Besides the fact that delay may lead to a stale warrant, the reason for requiring that warrants be executed "forthwith" is to assure the judicial control over searches that the warrant procedure is intended to accomplish under the Fourth Amendment. See U.S. ex Rel. Beal v. Skaff, 418 F.2d 430, at 433. Even if there were no prejudice to the individual because of an unreasonable delay, the courts should not allow admission of evidence where officers delay execution of the search warrant in order to wait until individuals are present on the premises in order to make arrests. This type of activity is clearly beyond the scope of reasonable execution of the warrant.

The importance of this exclusionary principle is well established. As stated by this Court in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341: "The tendency of those who execute the criminal laws of the country to obtain convictions by unlawful seizures ... should find no sanction in the judgments of the courts ...." 232 U.S. at 392, 34 S.Ct. 344

The importance of this question to the administration of criminal law in the area of unlawful searches justifies the granting of the writ.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ROMMEL BONDOC
Supreme Court Member

MICHAEL STEPANIAN
Attorney for Petitioners

F I L E D
Apr 1 1970
WM. B. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

GLORIA JEAN NEPSTEAD and JOHN EDWARD ASH,

Defendants-Appellees.

No. 25,005

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, MERRILL and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

On the morning of August 22, 1968, federal narcotics agents, executing a search warrant issued six days earlier, entered a house in San Francisco and seized laboratory equipment and chemicals used to manufacture d-Lysergic acid diethylamide, commonly known as LSD. Incident to the search three individuals on the premises were arrested. One of those persons, Gloria Jean Nepstead, was subsequently indicted together with John Edward Ash (who was not on the premises at the time of the search), the indictment charging both with unlawful manufacture of

LSD,[1] unlawful conspiracy to manufacture LSD,[2] and failing to register their manufacturing establishment with the Secretary of Health, Education and Welfare.[3]

Defendants moved to suppress the evidence seized, asserting that the agents executing the warrant had failed to abide by the "forthwith" requirement of Rule 41(c), F.R.Crim.P.,[4] although the warrant had been returned within 10 days as required in subsection (d) of that Rule.[5] The district court granted the motion and the government appeals under 18 U.S.C. § 3731. We reverse.

The warrant upon which the search was based directed the agents to "search forthwith" the house during the daytime to seize the property described in the warrant. Following seizure of the property, the agents were commanded to prepare an inventory and bring the property before the commissioner within ten days of the date of issuance.

At the hearing on the motion to suppress the agent failed to state explicitly why there was a six-day delay between the issuance of the search warrant and its execution. However, it is fair to conclude, as did the district court that the delay was the reasoned decision of the agent to withhold execution until some activity occurred on the premises to indicate that manufacturing of LSD was then in progress.

The agent testified that the house was checked

daily for signs of activity. On the afternoon of the fifth day following issuance of the warrant, no activity having been observed up until that time, agents received word from an informant that manufacturing was to occur that evening. After seeing activity in the house throughout the night, agents executed the warrant at 6:45 a.m. the next morning, seizing chemicals and equipment, the latter items shown by chemical analysis to contain residue of LSD.

On appeal the government justifies the delay in execution by asserting that any execution within ten days meets the command that it be executed "forthwith." However, to ascribe that meaning to "forthwith" would eliminate whatever intent the authors of Rule 41 had in adding that command to subsection (c), a step which we should not take lightly. Hence, we adopt the view of every court that has been directly presented with the problem and hold that the ten-day period merely sets the maximum under the Rule, and the requirement of execution "forthwith," depending on the circumstances of each case, may require execution in something less than ten days. House v. United States, 411 F.2d 725, 728 (D.C. Cir. 1969); Spinelli v. United States, 382 F.2d 871, 885 (8th Cir. 1967); rev'd on other grounds, 393 U.S. 410 (1969). Cf., Seymour v. United States, 177 F.2d 732 (D.C. Cir. 1949). But see, Mitchell v. United States, 258 F.2d 435, 436

(D.C. Cir. 1958) (dictum).

The meaning to be ascribed to the phrase "execute forthwith" has been a subject of some controversy among the circuits. (Compare United States v. Dunnings, __F.2d __ (2d Cir. dec. Nov. 17, 1969), with Spinelli v. United States, supra. While it is desirable that police be given reasonable latitude to determine when a warrant should be executed, it is also necessary that search warrants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated.

We adopt the reasoning of the Second Circuit in Dunnings to the effect that "forthwith" means any time within 10 days after the warrant is issued, provided that the probable cause recited in the affidavit continues until the time of execution, giving consideration to the intervening knowledge of the officers and the passage of time. Such a rule does not do violence to either objective behind Rule 41(c) and (d) because the officers are given reasonable latitude in executing the warrant and the person with standing to suppress the evidence seized is assured that the search is not made on something less than probable cause.

In the case before us, nothing, other than the passage of time, occurred during the six-day period between issuance and execution of the search warrant

which changed the facts upon which the original affidavit was based and which gave the agents probable cause to believe that articles subject to seizure were in the house. And, on the facts before us, the passage of time could not detract from probable cause because the house was kept under surveillance for signs of activity. The fact that the delay resulted in the arrest of the persons present and the seizure of the equipment while they were being used for their intended purpose is not the type of prejudice which defendants may assert in a motion to suppress. See United States v. Dunnings, supra.

The order granting appellee's motion to suppress is vacated and the cause remanded to the district court for further proceedings.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 307

GLORIA JEAN NEPSTEAD AND JOHN EDWARD ASH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 22, 1968, federal narcotics agents executed a search warrant obtained six days earlier for a house in San Francisco. The agents, pursuant to the authority granted by the warrant, seized laboratory equipment and chemicals used to manufacture LSD; they also arrested three persons found on the premises at the time of the search, including petitioner Nepstead. Subsequently, Nepstead and petitioner Ash were indicted for conspiracy to manufacture LSD, manufacture of that drug, and failing to register their manufacturing establishment with the Secretary of Health, Education, and Welfare, in violation of 18 U.S.C. 371 and 21 U.S.C. 331(q)(1),

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360(b), 331(p). Petitioners moved prior to trial to suppress the evidence seized, arguing that the agents had not complied with the "forthwith" requirement of Rule 41(c), F. R. Crim. P., regarding the time within which search warrants must be executed. The district court granted the motion. The United States appealed under 18 U.S.C. (Supp. V) 3731; the court of appeals reversed (Pet. App.) and thereafter denied a petition for rehearing *en banc on* May 8, 1970. The petition for a writ of certiorari was not filed until June 22, 1970, and is thus out of time under Rule 22(2) of the Rules of this Court.

Petitioners maintain that there is a conflict among the circuits relating to whether a search warrant is always valid if executed within the ten-day maximum period prescribed by Rule 41(d), F. R. Crim. P. They construe the court of appeals' decision below as adopting a *per se* rule that it is, and claim this is in conflict with holdings in the Eighth, Seventh, and District of Columbia Circuits. The court below, however, did not purport to hold that a search warrant would always be valid if executed within ten days. Rather, it stated (Pet. App. 3):

> Hence, we adopt the view of every court that has been directly presented with the problem and hold that the ten-day period merely sets the maximum under the Rule, and the requirement of execution "forthwith," depending on the circumstances of each case, may require execution in something less than ten days.

The court then went on to analyze the circumstances of the instant case, finding that nothing had taken place within the six-day period between issuance and execution of the warrant to alter the facts upon which the original affidavit was based (Pet. App. 4–5). The result reached by the court of appeals was proper and was not predicated upon any principle as to which a conflict in the circuits exists. This Court recently denied certiorari in two cases presenting identical claims. *United States* v. *Dunning*, No. 32527, C.A. 2, decided November 17, 1969, certiorari denied, 397 U.S. 1002 (No. 1583 Misc., 1969 Term)[1]; *House v. United States*, 411 F. 2d 725 (C.A.D.C.), certiorari denied, June 22, 1970 (No. 2151 Misc., 1969 Term).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

EDWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

[1] Indeed, the court below relied extensively on the court of appeals' decision in the *Dunnings* case in reaching its result. See Pet. App. 4, where the court stated: "We adopt the reasoning of the Second Circuit in *Dunnings* to the effect that 'forthwith' means any time within 10 days after the warrant is issued, provided that the probable cause recited in the affidavit continues until the time of execution, giving consideration to the intervening knowledge of the officers and the passage of time. Such a rule does not do violence to either objective behind Rule 41 (c) and (d) because the officers are given reasonable latitude in executing the warrant and the person with standing to suppress the evidence seized is assured that the search is not made on something less than probable cause."